Supreme Court, U. S.
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IN THE

Supreme Court of the United States

Term, 1973 No. 72-1153

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY

and

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION

and

THOMAS J. MAGRANN

and

STEPHEN J. TRAITZ, *Petitioners*

v.

ALTEMOSE CONSTRUCTION CO., *Respondent*

Petition for a Writ of Certiorari to The Supreme Court of Pennsylvania Eastern District

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IN THE

Supreme Court of the United States

Term, 1973 No.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY; LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION; THOMAS J. MAGRANN; and STEPHEN J. TRAITZ, *Petitioners*

v.

ALTEMOSE CONSTRUCTION COMPANY, *Respondent*

Petition for a Writ of Certiorari To the Supreme Court of Pennsylvania Eastern District

Petitioners, BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, LOCAL 30, UNITED SLATE TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, THOMAS J. MAGRANN and STEPHEN J. TRAITZ, pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered on October 20, 1972, Petition for Reargument denied on November 29, 1972, in *Altemose Construction Company v. Building and Construction Trades Council of Philadelphia and Vicinity; Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association; Thomas J. Magrann and Stephen J. Traitz.*

OPINIONS BELOW

The opinions of the Supreme Court of Pennsylvania, which have been reported at 296 A.2d 504 (1972), are reprinted in Appendix A, Pages 1 to 29, infra. The Decision and Order of the Court of Common Pleas of Montgomery County, which has not been reported, is reprinted in the Appendix C, Pages 32 to 47, *infra*.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on October 20, 1972. A timely petition for reargument was denied on November 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Where, during a labor dispute, there occurs violence and damage, does an injunction issued by a state court which prohibits all peaceful picketing or any other meaningful peaceful concerted activity, violate the rights of Defendants under the First and Fourteenth Amendments to the United States Constitution?

2. Where picketing is arguably protected or prohibited by the provisions of the *Labor Management Relations Act of 1947, as amended*, 29 U.S.C.A. Section 158, et seq. and a state court issues an injunction prohibiting all picketing, has the court exceeded its jurisdiction and powers?

3. Where a state court enjoins unions, their agents and individuals from engaging in all peaceful picketing and other peaceful concerted activities within two hundred (200) yards of the Employer's premises, is such an Order void or invalid as a violation of defendants' rights under the First and Fourteenth Amendments of the United States Constitution, U.S.C.A. Const. Amend. 1; 14?

STATEMENT OF THE CASE

A. The factual background

The BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY is a labor organization composed of more than seventy (70) affiliated craft unions operating in the five County area of Philadelphia, Montgomery, Chester, Delaware and Bucks Counties in the Commonwealth of Pennsylvania.* During the early part of 1972, various disputes arose between the Council and Altemose Construction Company** over the wage and employees' benefit policies of Altemose and its subcontractors. As a result of the aforementioned dispute, the Council determined that a picket line would be established at one of Altemose's construction projects. The Valley Forge Plaza Project was chosen as the location of the picket line and picketing was scheduled to commence on June 5, 1972.

On the morning of June 5, 1972, prior to the commencement of picketing, extensive property damage occurred at the Valley Forge construction site. Thereafter, once order was restored at the site, peaceful picketing by the Council and members of its affiliated Unions commenced and continued during the remainder of the day.

As a result of the property damage which preceded the picketing, Altemose filed a complaint in the Court of Common Pleas of Montgomery County, Commonwealth of Pennsylvania, seeking the issuance of a preliminary injunction which would bar all picketing by the Council, its affiliates, members, agents and all other individuals. Following an ex parte hearing, the Court of Common Pleas issued a temporary restraining order prohibiting coercion, violence, mass picketing and, *inter alia:*

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* Petitioner BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY shall hereinafter be referred to as "Council."

** Altemose Construction Company shall hereinafter be referred to as "Altemose."

"(b) . . . have any pickets in front of or in close proximity to any entrances of Valley Forge Plaza or any other location at which Altemose Construction Company is engaged in construction work and the premises of Altemose Construction Company . . .

"(c) . . . congregating, loitering or gathering in front of, near, or about said premises or the entrances thereto at any time . . .

"(d) . . . congregating or assembling in groups within one mile of any of the aforesaid locations; . . ."

B. Proceedings in the courts below

1. The Court of Common Pleas of Montgomery County

On June 9, 1972 and on June 12, 1972 evidence was taken at a hearing on the preliminary injunction being sought by Altemose. The Council and all other defendants filed with the Court preliminary objections and a motion to dissolve, both of which were denied. At the conclusion of the hearing, the Court of Common Pleas entered an Order as follows:

"Therefore, this 12th day of June, 1972, the injunction granted by the Court on June 5, 1972 is hereby continued in full until final hearing or until further Order of this Court."

An Appeal to the Supreme Court of Pennsylvania followed. In compliance with the Rules of the Supreme Court of Pennsylvnaia, the Court of Common Pleas filed an opinion in support of its order, a true and correct copy of which is reprinted in Appendix C hereto.

2. *The Supreme Court of Pennsylvania*

The appeal was argued before the Supreme Court of Pennsylvania on September 6, 1972. The case was heard on consolidated appeals filed by the Council and its

members relative to the scope of the injunction and, in addition, a subsequent finding that certain members of trade unions affiliated with the Council were in contempt of the trial Court's June 5 temporary restraining order. It should be noted that Petitioners do not seek review of the Supreme Court's ruling as to the contempt citations. The only matters for which review is sought relate to the scope of the injunction.

On October 20, 1972 the Supreme Court of Pennsylvania, by a unanimous vote, determined that the injunction issued by the Court of Common Pleas was overly broad and should be modified. This determination is contained in the opinion of the court, reprinted in Appendix A. The Supreme Court, however, was evenly divided (one justice did not participate in the Decision) as to how the injunction should be modified. Accordingly, two separate opinions, with three justices joining in each, were rendered, suggesting alternative methods of modifying the injunction. Both supplemental opinions are reprinted in Appendix A.

In an Opinion titled OPINION IN SUPPORT OF MODIFICATION OF DECREE WITH REJECTION OF ALL DISTANCE RESTRICTIONS AND REVERSAL OF CONTEMPT JUDGMENTS, Justices Roberts, Nix and Manderino determined that the injunction should be modified into the narrowest terms possible so as to assure appropriate restraints as to future outbreaks of violence. The three justices determined that this goal could be accomplished by limiting the number of pickets at the construction site, with appropriate controls as to the spacing and motion of the individual pickets. The Opinion held that such limitations would insure against future outbreaks of violence while at the same time protecting the Union's right to conduct peaceful picketing and other activities at the Altemose site.

In a separate Opinion titled OPINION IN SUPPORT OF AFFIRMANCE OF DECREE AT NO. 31 WITH MODIFICATION, AND OF REVERSAL OF JUDGMENTS OF CONTEMPT AT NO. 40, Justices Pomeroy, Eagen and Jones concluded that the Common Pleas Court was justified

in barring all peaceful picketing and in addition that the Court could establish distance restrictions. The only modification suggested by Justices Pomeroy, Eagen and Jones is that the one mile limitation contained in the trial Court's injunction be modified to prohibit even peaceful activities by the Unions and their members within two hundred yards of any Altemose operation.

A timely petition for reargument was filed on behalf of the Council and all other defendants. On November 29, 1972 the Court entered its Order denying the petition for reargument. Notice of said denial is reprinted in Appendix B, hereto.

3. *The Court of Common Pleas of Montgomery County*

On October 25, 1972 the Court of Common Pleas of Montgomery County, without hearing or prior notice, chose to adopt the reasoning contained in the Pomeroy Opinion and entered an order amending the injunction as follows: (Appendix D)

"ORDER

"AND NOW, this 25th day of October, 1972 the Order of this Court dated June 5, 1972 is hereby amended to read as follows:

"(d) . . . from congregating or assembling in groups within two hundred (200) yards of any of the aforesaid locations.'

"In all other respects the Order of this Court of June 5, 1972 is hereby confirmed and continued and will remain in full force and effect.

BY THE COURT:

/s/VINCENT A. CIRILLO, J."

Thus, the amended Order by the trial court came prior to a ruling by the Supreme Court of Pennsylvania on the petition for reargument, and at a time when the trial court

was devoid of any majority guidance because of the divided Opinion in the appellate court. When the Supreme Court of Pennsylvania ultimately denied the petition for reargument on November 29, 1972, the lower court had already acted to accept the suggested modifications contained in the Opinion by Justice Pomeroy. Accordingly, the Court below refused to reconsider the devastating effect of its divided Opinion, following actual adoption of the distance restriction concept by the trial court.

REASONS FOR GRANTING THE WRIT

I. The Decision below raises significant questions as to whether a state court possesses jurisdiction to bar peaceful concerted activities by trade unions and their members.

The issues presented in the instant case emanate from a divided Opinion by the Supreme Court of Pennsylvania which has caused Petitioners and over seventy affiliated labor organizations to suffer the denial of basic rights guaranteed under the First and Fourteenth Amendments to the United States Constitution. U.S.C.A. Const. Amend. 1; 14. The sanction by the Court below of an injunctive decree which bars not only peaceful picketing, but establishes a two hundred yard distance restriction within which Petitioners or their members dare not go, violates the principles set forth in *Carol, et al. v. President & Commissioners of Princess Anne, et al.*, 393 U.S. 175, 89 S. Ct. 347 (1968); *Shelton, et al. v. Tucker, et al.*, 364 U.S. 479, 81 S. Ct. 247 (1960); *Youngdahl v. Rainfair*, 355 U.S. 121, 78 S. Ct. 207 (1957), and other decisions of this Court.

In *Youngdahl v. Rainfair, supra*, this Court held that, while a state court possesses jurisdiction under its police powers to control violent conduct incident to labor disputes, it does not possess jurisdiction to bar peaceful activities of labor organizations engaged in such disputes. The rationale underlying the court's holding is that picketing and related conduct is a form of assembly and as such comes under the Constitutional protections embodied in the First and Fourteenth Amendments to the United States Constitution. U.S.C.A. Const. Amend. 1; 14. *AFL v. Swing*, 312 U.S. 321, 62 S. Ct. 568 (1941); *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276 (1945); *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 68 LRRM 2209 (1968). In addition, peaceful concerted activity by unions may enjoy the protections embodied in Section 7 of the Labor Management Relations Act of 1947, *as amended*, 29 U.S.C.A. §157.

Prior to the instant case, the foregoing principles were never severely tested by the courts in Pennsylvania. Where violence occurred during labor disputes, the courts consistently upheld the states' right to control such conduct, usually by limiting the number of pickets with appropriate restraints on their mobility. See *City Line Open Hearth, Inc. v. Hotel, Motel and Club Employees' Union*, 413 Pa. 420, 197 A.2d 614 (1964). In the *City Line Open Hearth* case, the Supreme Court of Pennsylvania felt that an injunction which did more than restrain violence and threats of violence would be overly broad and unnecessarily infringe upon individual rights guaranteed by the Constitution, a principle discussed extensively by this Court in *Carol, et al. v. President & Commissioners of Princess Anne, et al., supra.*

In the instant case, the trial court somehow lost sight of the "narrow objective" doctrine enunciated in the *Carol* case, id., and issued an Order which barred all peaceful picketing and activity within one mile of any Altemose site. (Appendix C). On appeal, the Supreme Court of Pennsylvania divided evenly with three justices favoring a bar on all peaceful picketing with modification of the one mile distance restriction to two hundred (200) yards (Pomeroy Opinion, Appendix A). The opposing three justices felt that the "narrow objective" test in *Carol, supra*, could be satisfied by a more conventional Order limiting the number of pickets at the construction site. (Roberts' Opinion, Appendix A). As a result of the divided Opinion, the trial court, acting without any majority guidance, subsequently amended its Order so as to bar all union activity within two hundred yards of the Altemose site. (Appendix D)

The authority relied upon in the Pomeroy Decision, (Appendix A, Page 6a), is the case of *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552 (1941), where this Court upheld a blanket injunction by a State Court barring even peaceful picketing. An application of the *Meadowmoor* doctrine to the instant facts, however, is not only erroneous, but it is clear that *Meadowmoor*

no longer retains its vitality in light of more recent decisions by this Court. See *Youngdahl v. Rainfair, supra.* In *Meadowmoor*, a trial court issued an injunction barring only the violent conduct incident to an existing labor dispute. A subsequent appeal to the Illinois Supreme Court found that Court examining the purpose or object of the picketing. As a result, the Illinois Supreme Court concluded that there should be a prohibition of picketing, not because of the manner of picketing but because of the object thereof. The Court concluded that the picketing constituted an illegal secondary boycott which infringed on the rights of the Company in question. *Meadowmoor Dairies v. Milk Wagon Drivers Union*, 371 ILL. 377, 21 NE2d 308, 1 CHH Labor Cases 991 (1939). On a subsequent appeal to this Court, the Decision of the Illinois Supreme Court was affirmed by a divided Court with two separate dissenting Opinions. The majority Opinion made no allusion to the area of exclusive primary jurisdiction under the Labor Management Relations Act in view of the fact that this doctrine had not developed in the manner as set forth in *Youngdahl v. Rainfair, supra.*

In the instant case, the Supreme Court of Pennsylvania, while referring to *Youngdahl v. Rainfair, supra*, in its dictum, 296 A.2d 504, 513 (Appendix A, Page 18a), nevertheless chose to ignore the principles enunciated in that case in favor of the broader, more sweeping concepts discussed in the *Meadowmoor* case. It is clear, however, that *Meadowmoor* has been used and quoted out of context since the appeal in that case was not from an injunction barring all picketing because of violence, but because of object. Nevertheless, the Supreme Court of Pennsylvania here, and other state courts in the past, *United Aircraft Corporation v. International Association of Machinists*, 161 Conn. 79, 285 A.2d 330 (1971); *Cert. Denied*, 404 U.S. 1016, 92 S. Ct. 675, 30 L. 2dEd. 663 (1972); *Local No. 612, International Brotherhood of Teamsters v. Bowman Transportation Co., Inc.*, 276 Ala. 563, 165 So.2d 113 (1964); *Angle v. Owsley*, 332 S.W.2d 457 (Mo. App. 1959) have seized upon

the rationale of *Meadowmoor* to prohibit all peaceful picketing because of violence. These decisions ignored the narrow objective test set forth by this Court in *Carol, et al. v. President & Commissioners of Princess Anne, et al., supra*, and other decisions which place the *Meadowmoor* facts within the exclusive jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council v. Garmon*, 359 U.S. 239, 79 S. Ct. 773 (1959); *Amalgamated Association of Street, Electrical, Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 91 S. Ct. 1909 (1971).

The Pomeroy Opinion went further, however, than even *Meadowmoor*. Here the Court below, in addition to barring all peaceful picketing and other concerted activities, allowed the establishment of a two hundred yard distance restriction within which Petitioners may not lawfully picket or congregate. Had the Court below felt that the public order demanded some type of protection, it would have been a simple matter to adopt the rationale expounded by the three justices joining in the Roberts' Opinion; i.e., limitation of the number of pickets and strict limitations on their mobility. Such an injunction would at the same time both afford the protections necessary to maintain public order while protecting the constitutional rights of the Petitioners to peacefully and lawfully picket and communicate the terms of the dispute to others.

In *Carol, et al. v. President & Commissioners of Princess Anne, et al., supra*, this Court held that an injunction affecting the area of First Amendment rights must be couched in the narrowest possible terms. Here, the injunction issued by the trial court and sanctioned by the divided Opinion in the Supreme Court of Pennsylvania fails to meet the test set forth in *Carol*. The justification offered by the Court below, in ignoring the "narrow objective" test, has its basis in the *Meadowmoor* Decision. Clearly, the continued application of the *Meadowmoor* rationale conflicts with more recent decisions of this Court and with the constitutional rights of Petitioners to conduct peaceful picket-

ing. Accordingly, the instant case should be reviewed and *Meadowmoor* revisited so that the limitations of state court jurisdiction in labor injunctions may be appropriately defined. The divided Opinion in the Court below, and the confusion incident thereto, creates a substantial threat to peaceful union activity throughout the Commonwealth of Pennsylvania.

II. The Decision below, if upheld, may effectively preclude the Petitioners from engaging in activities protected by Section 7 of the Labor Management Relations Act of 1947, as amended.

The Opinion of the Court below in support of barring all picketing and the establishment of distance restrictions relied heavily on the rationale of this Court in the *Meadowmoor* (supra) case. Accordingly, the lower court ignored the more recent decisions by this Court which overturned injunctions barring peaceful picketing where such conduct is arguably protected or prohibited under the provisions of the Labor Management Relations Act of 1947, 29 U.S.C.A. §151, et seq. 61 Stat. 136, et seq.; *Youngdahl v. Rainfair, supra.*

It is the position of the Petitioners that they are picketing to protest the destruction of area wage standards by Altemose and its subcontractors. If this is true, then it is submitted that such conduct is protected by the Labor Management Relations Act of 1947, *as amended*, 29 U.S.C.A. §§157, 158. *Calumet Contractors Association*, 133 NLRB 512, CCH NLRB §10,425 (1961); *Everett Construction Co.*, 136 NLRB 321, CCH NLRB §11,000 (1962).

It is the position of Altemose that the real objective of the Petitioners is to force Altemose to utilize only union subcontractors. If this be true, then such conduct similarly may constitute protected activity. *Blinne Construction Co.*, 135 NLRB 1153 (1962); *Essex County District Council v. National Labor Relations Board*, 322 F.2d 636 (3rd Cir.

1964); *Samoff v. Building Trades Council*, —— F. Supp. ——, 80 LRRM 3358 (D.C.E.D. Pa. 1972). On the other hand, it may very well be that such an objective is prohibited by the Act. *Dallas Building Trades v. National Labor Relations Board*, 396 F.2d 677 (D.C. Cir. 1968).

In either event, it is clear that a determination of the dispute between the present parties lies within the exclusive primary jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council v. Garmon*, 359 U.S. 239, 79 S. Ct. 773 (1959); *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S. Ct. 1423, 10 L. Ed2d 638 (1963); *Amalgamated Association of Street, Electrical, Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 91 S. Ct. 1909 (1971).

While the lower court recognized the limitations of its jurisdiction under the foregoing doctrines, the Court nevertheless rendered a finding that the acts complained of by Petitioners constitute an illegal secondary boycott within Section 8(b)(4) of the Labor Management Relations Act, 19 U.S.C.A. §158(b)(4). 296 A.2d 504, 510 (Appendix A, Page 13a). Clearly a state court has no jurisdiction to render such a finding. *San Diego Building Trades Council v. Garmon, supra.* In so doing, the justices joining in the Pomeroy Opinion utilized this alleged illegal activity as further justification for the issuance of a sweeping injunction. The lower court thus ignored the protections guaranteed Petitioners under Section 7 of the Labor Management Relations Act, 29 U.S.C.A. §157, (Appendix E, Page 51a), and exceeded its jurisdiction by rendering a finding which only the National Labor Relations Board has jurisdiction to make. *Youngdahl v. Rainfair, supra.*

It is clear that the disputes between the present parties are judicially within the purview of the National Labor Relations Board. Accordingly, *Youngdahl v. Rainfair, supra,* and the line of cases spelling out the pre-emption doctrine make obvious the fact that the injunction, insofar as it

restrains peaceful picketing and other concerted activity, is invalid and outside the jurisdiction of the Court.

III. The uncertainty created by the divided opinion of the Court below constitutes a significant threat to protected union activity throughout the Commonwealth of Pennsylvania.

It is basic constitutional law that the guarantees to due process are lost when dealing with an order or statute that is so vague that men of common intelligence must guess at its meaning and differ at its application. *Connelly v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 106 (1926); *Ashton v. Ken*, 384 U.S. 195, 86 S. Ct. 1407 (1906).

The establishment by the Court below of distance restrictions within which Petitioners may not peacefully congregate raises many issues as to whether Petitioners' constitutional rights are being unduly burdened. For example, does the instant injunction mean that, if Petitioners have a dispute with a totally unrelated employer a block away from one of the many, but undefined, locations of Altemose they may not picket this employer? Does the injunction mean that, if an affiliated craft of the Building Trades Council representing the employees of one of Altemose's subcontractors has an economic strike, such affiliated craft may not picket pursuant to the terms of normal economic strike action? The very essence of the injunction of the Court below affects the rights of all craft unions against all contractors any place, anywhere, so long as it is within two hundred yards of some Altemose location.

The Court below indicated at 296 A.2d 504, 515 (Appendix A), Page 21a), that the original one mile restriction was overly broad because, depending on the placement from time to time of Altemose construction sites, Petitioners' First Amendment rights to peaceful assembly could be effectively eliminated in Southeastern Pennsylvania. The

modification of the one mile distance restriction to "within two hundred yards" hardly eliminates this defect.

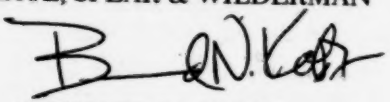
While the lower Court's order is confusing and subject to infinite interpretations, it is clear that the severity of the problems caused by the divided Opinion below may not be limited in effect to Petitioners in the five County Philadelphia area. Although Petitioners represent over seventy affiliated labor organizations, thousands of other unions throughout the Commonwealth may feel the sting of the uncertainty created by the Decision in this case. It is not unlikely that courts of lower jurisdiction may seize upon the *Pomeroy* rationale and issue "two hundred yard injunctions" in situations where the facts are not remotely similar to the instant case. The vagueness which now exists in Pennsylvania as to the proper scope of labor injunctions creates a significant threat to the protected activities of trade Unions throughout the Commonwealth. Such issues demand consideration by this Court.

CONCLUSION

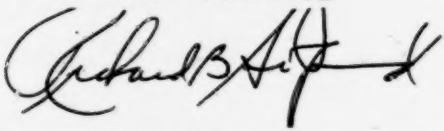
For these reasons, a Writ of Certiorari should issue to review the judgment and Opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,

MERANZE, KATZ, SPEAR & WILDERMAN



By: BERNARD N. KATZ



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APPENDIX A

IN THE

Supreme Court of Pennsylvania

EASTERN DISTRICT

January Term, 1973 No. 31

Appeal from the Decree of the Court of Common Pleas of Montgomery County, Law Division, entered June 12, 1972 at No. 72-6295.

January Term, 1973 No. 40

Appeals from the Judgments of Contempt of the Court of Common Pleas of Montgomery County, Law Division, entered June 6, 1972 at No. 72-6295.

ALTEMOSE CONSTRUCTION COMPANY

v.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY; LOCAL UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION; THOMAS MAGRANN; and STEPHEN J. TRAITZ; and OTHERS, *Appellants*

OPINION OF THE COURT

Per Curiam:

The Court is unanimous that the judgments of contempt at No. 40 should be reversed and the fines paid refunded, and it is so ordered.

The Court is unanimous that the Decree at No. 31 is too broad and must be modified, but the Court is equally divided as to the nature and extent of modification. Mr. Justice Pomeroy files an opinion in which Mr. Chief Justice Jones and Mr. Justice Eagen join in support of affirmance of the Decree at No. 31, but with modification of clause (d) of par. 1 thereof so as to reduce the distance within which congregating or assembling by appellants is prohibited, Mr. Justice Roberts files an opinion in which Mr. Justice Nix and Mr. Justice Manderino join in support of modification of the Decree at No. 31 with rejection of all distance restrictions.

Decree at No. 31 to be modified; costs on appellants. Judgments at No. 40 reversed; costs on appellee.

Mr. Justice O'Brien did not participate in the consideration or decision of this case.

FILED: OCTOBER 20, 19

APPENDIX A

IN THE

Supreme Court of Pennsylvania

EASTERN DISTRICT

January Term, 1973 No. 31

Appeal from the Decree of the Court of Common Pleas of Montgomery County, Law Division, entered June 12, 1972 at No. 72-6295.

January Term, 1973 No. 40

Appeals from the Judgments of Contempt of the Court of Common Pleas of Montgomery County, Law Division, entered June 6, 1972 at No. 72-6295.

ALTEMOSE CONSTRUCTION COMPANY

v.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY; LOCAL UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION; THOMAS MAGRANN; and STEPHEN J. TRAITZ; and OTHERS, *Appellants*

Opinion in support of modification of decree with rejection of all distance restrictions and reversal of contempt judgments.

Roberts, J.

I.

I agree with my brethren that the judgments of civil contempt must be reversed and the fines refunded. Adjudications of contempt, obtained as here, by procedural irregularities which violate appellants' due process rights, are constitutionally defective and impermissible.

II.

However, I am unable to agree that the modification of the overlybroad preliminary injunctions, which reduces the no-picketing distance from "within one mile" of the construction sites to "within 200 yards," cures the impairment of appellants' First Amendment right to lawful protest at the construction site.

The clear mandate of *Carroll v. Commissioners*, 393 U.S. 175, 184, 89 S.Ct. 347, 353 (1968), is that orders affecting First Amendment rights "must be tailored as precisely as possible to the exact needs of the case." The "exact needs" of this case are to prevent further outbreaks of violence and destruction by appellants, while simultaneously preserving appellants' right to lawfully and peacefully protest appellee's employment practices. The injunction, as modified in the other opinion, does not meet the required standard of being "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order." *Carroll*, supra.

We conclude, as we must, that the one mile prohibition of picketing impermissibly infringes appellants' right to lawful and meaningful protest. However, merely substituting "200 yards" for the "one mile" restriction fails to remove the unreasonable restraint which requires striking down the one-mile distance. Both limitations suffer basically from the identical defect—they restrain in the *broadest* terms, not in the *narrowest* terms possible. Is there any substantial

distinction between compelling the union to conduct its protest one mile away or further than 600 feet from the site? Both restrictions place the union essentially out of sight of the focus of its protest and consequently serve to effectively deny the right of meaningful protest. Moreover, it is appropriate to suggest that both of these restrictions could actually place the picketing near property owned or occupied by persons unrelated to and in no way subjects of the protest.

Thus, the modification of the other opinion fails to achieve the proper objectives here required—the restraint of violence and the sanction of peaceful picketing. In my view a decree which permits picketing at the site, rather than 600 feet away, but restricts such activity to a reasonable number of pickets, complies with the First Amendment and "the exact needs of the case." Cf. *Taylor Fibre Co. v. Textile Workers Union*, 395 Pa. 535, 151 A.2d 79 (1959); *Westinghouse v. United Electrical Workers*, 383 Pa. 297, 118 A.2d 180 (1955). Therefore, I would modify the injunction to permit picketing at the sites by not more then ten pickets at any one time; these pickets to be in motion at all times, to be spaced not less than 15 feet apart in a single line, and to conduct themselves in such manner as not to block, interfere with, or impede either the lawful ingress or egress from these locations or any other vehicular or pedestrian traffic adjacent to such areas.

The 200 yard restriction suggested in the other opinion must be rejected as constitutionally impermissible.

MR. JUSTICE NIX and MR. JUSTICE MANDERINO join in this opinion.

MR. JUSTICE O'BRIEN did not participate in the consideration or decision of this case.

FILED: OCTOBER 20, 1972

APPENDIX A

IN THE

Supreme Court of Pennsylvania

EASTERN DISTRICT

January Term, 1973 No. 31

Appeal from the Decree of the Court of Common Pleas of Montgomery County, Law Division, entered June 12, 1972 at No. 72-6295.

January Term, 1973 No. 40

Appeals from the Judgments of Contempt of the Court of Common Pleas of Montgomery County, Law Division, entered June 6, 1972 at No. 72-6295.

ALTEMOSE CONSTRUCTION COMPANY

v.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY; LOCAL UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION; THOMAS MAGRANN; and STEPHEN J. TRAITZ; and OTHERS, *Appellants*

Opinion in support of affirmance of decree at No. 31 with modification, and of reversal on judgments of contempt at No. 40.

POMEROY, J.

We are asked today to decide important First Amendment and federal preemption challenges to the power of

a state equity court to enjoin picketing in the context of a labor dispute. Additional questions are raised touching on the inherent differences between civil and criminal contempt proceedings. These issues are the subject matter of consolidated appeals taken by the defendants, Building and Construction Trades Council of Philadelphia and Vicinity; Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association; Thomas Magrann;[1] and Stephen J. Traitz,[2] and others [hereinafter collectively "Council"], from a decree of the Court of Common Pleas of Montgomery County granting a preliminary injunction and from separate judgments of the same court finding certain members of the defendant organizations in contempt.[3]

We commence with the observation that the circumstances giving rise to both suits are marked by a degree of violence and destruction reflecting little improvement in the state of labor relations during the three quarters of a century since the Pullman and Homestead strikes. It is not disputed that on June 5, 1972, at approximately 7:30 A.M., an estimated 1,000 persons, including defendants Magrann and Traitz, descended upon the Valley Forge Plaza construction site of plaintiff-respondent, Altemose Construction Company (hereinafter "Altemose"), a Pennsylvania corporation engaged extensively in the building industry in the southeastern sector of the state. Many of the persons involved arrived on seven buses, chartered and paid for by defendant Local 30; others came in a caravan of privately owned automobiles; many carried signs of allegiance to the defendant Council. There then began what was de-

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1. Defendant, Thomas Magrann is the Business Manager of defendant Council.

2. Defendant, Steven J. Traitz, is the Business Manager of defendant Local 30.

3. Although we refer to appellant Council in both appeals, technically it is the appellant in the equity action only, and individual members of the Council and Union are the parties to the contempt proceedings.

scribed by the hearing judge as "a virtual military assault" on the site where Altemose was constructing a Sheraton Hotel and office building, resulting in the systematic decimation of the project. Damage was estimated at $300,000 and included the following: 4,000 feet of eight-foot high cyclone fence was leveled; an office building, guard hut, and construction trailer were burned to the ground; bulldozers, graders and pans were set afire, or battered with hammers and bars, and lime was added to the fuel tanks of these vehicles. Two security guards were stoned and their vehicle totally destroyed. Local police were impotent to control the mob, and fire trucks dispatched to the scene were turned back because the safety of the firemen was endangered. Throughout this entire scene of violence and destruction a crowd of members of the Council cheered; not until the state police arrived was order restored.

Later that same day, June 5, Altemose filed a complaint in equity in the Montgomery County Court of Common Pleas to restrain the unlawful actions of defendants. Following an ex parte hearing[4] at which injunction affidavits and testimony of plaintiffs were presented, the court made findings as to the force and violence employed by the Council. A preliminary injunction then issued, enjoining the defendants and their agents from interfering by violence or coercion with Altemose's operations, from picketing in close proximity to the premises of Altemose or to any Altemose construction site, or from congregating in groups within one mile of locations.[5] The sheriff of

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4. Altemose's counsel indicated at the June 5 hearing that his efforts to serve notice on defendants of plaintiff's intentions to present its petition for a preliminary injunction had proved unavailing. Telephone messages left at the office of the Council's attorney received no response, and Local 30 was sent a telegram between 1:00 P.M. and 1:30 P.M. because it had no 'phone listing. The hearing commenced at approximately 4:00 P.M.

5. Specifically, the preliminary injunction of June 5 decreed:

"1. That an Injunction be issued, preliminary until hearing is held enjoining and restraining the defendants,

Montgomery County was ordered to enforce the injunction and a further hearing was set for June 9.

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their members, and all persons acting on behalf of them or any of them.

(a) From preventing or attempting to prevent by picketing, violence, intimidation or coercion in any form, any person or persons from freely entering or leaving the premises of Valley Forge Plaza at which Altemose Construction Company is engaged in the building construction of a hotel and office building or any other location at which Altemose Construction Company is engaged in any building construction operations or the principal office of Altemose Construction Company, located at 1166 DeKalb Pike, Center Square, Pennsylvania;

(b) From having any pickets in front of or in close proximity to any entrance of Valley Forge Plaza, or any other location at which Altemose Construction Company is engaged in construction work and the premises of Altemose Construction Company;

(c) From congregating, loitering or gathering in front of, near to or about said premises, or the entrances thereto at any time;

(d) From congregating or assembling in groups within one mile of any of the aforesaid locations;

(e) From interfering with any deliveries to or by Altemose Construction Company at any of the aforesaid locations;

(f) From blocking free ingress and egress to and from the premises of Valley Forge Plaza, Altemose Construction Company or any location at which Altemose Construction Company is engaged in building construction.

(g) From taking any action or pursuing any course or conduct which is intended to or has the necessary effect of threatening, intimidating or coercing officers, supervisors and employees of Altemose Construction Company or persons doing business with Altemose Construction Company;

(h) From threatening, intimidating or harassing employees of Altemose Construction Company or persons doing business with Altemose Construction Company;

(i) From seizing or damaging any property of Altemose Construction Company, its officers, supervisors or employees or persons doing business with Altemose Construction Company, including subcontractors."

On the following morning, June 6, 129 picketers associated with the defendant Council were arrested at Altemose's headquarters for violating the previous day's order. At a hearing on the afternoon of the 6th, all but four were found to be in civil contempt. Their appeals from these judgments were consolidated with the appeal of all defendants from the preliminary injunction decree, and will be treated later in this opinion.

Pursuant to the June 5 decree of court, further hearings on the preliminary injunction were held June 9 and June 12. At these times, plaintiff called numerous witnesses; defendants were represented by counsel but offered no testimony. Following the completion of the June 12 proceedings, the court, from the bench, continued the order previously entered. The appeals presently before us were taken from the decree of June 12 continuing the preliminary injunction and from the judgments of contempt entered on June 6.[6]

In addition to its account of the events of June 5 and 6, the chancellor made the following findings of fact among others: the defendants have engaged in a course of conduct, including picketing and acts of violence, spanning an entire year, calculated to force Altemose to enter into an agreement to utilize only union subcontractors. Threats by defendant Traitz to Altemose in August, 1971 proved unavailing, whereupon the Council began picketing Altemose's school construction site at Prospect Park, Delaware County on January 24, 1972. On February 3, 1972, the Prospect Park construction trailer was burned by an incendiary device and $3,000.00 worth of damage was inflicted on work in progress. The following month, five

6. On August 30, 1972, presumably in compliance with our Rule 56, the chancellor, Judge Cirillo, filed a formal adjudication, consisting of findings of fact, discussion, conclusions of law and a decree. The decree is dated Aug. 30, 1972, but is verbatim the same as that entered initially on June 5 and continued by order from the bench on June 12. We consider it to be a written formalization of the June 12 oral decree, from which the appeal is taken, and not a new decree entered Aug. 30, 1972. The court also, on Aug. 28, 1972, filed an opinion in support of the judgments of contempt.

of Altemose's trucks were drenched with gasoline and set afire. When attempts at settlement during May, 1972 were unsuccessful, the Council decided to picket the Valley Forge site, this decision leading directly to the events of June 5.

The lower court further found that the acts against Altemose were indicative of a broader proclivity on the part of the Council and its members to achieve their goals by violence and intimidation. Thus on January 25, 1972, the court found an employee of another area contractor was attacked by six pickets, when he attempted to cross the picket line of a Council member union. In the assault the victim suffered multiple fractures, contusions, lacerations, a concussion, and $900 worth of dental damage. Following this episode, a court order limiting the number of pickets was obtained. Nevertheless, large numbers of persons associated with the Council gathered nearby in violation of the order and one even engaged in target practice while on picket duty by firing at tin cans. On April 10, 1972, two employees of still another local contractor were beaten into unconsciousness when pickets representing a member of the Council appeared at the job sites where the victims were working. Neither was attempting to cross a picket line. On May 17, 1972 two members of an area roofing contractor were beaten by members of defendant Local 30, including defendant Traitz, after Local 30 had been rejected in an NLRB supervised election. Previously, on May 7, 1972, seven trucks of the same roofing company had been firebombed.

Both before and after the issuance of the preliminary injunction in this case, J. Leon Altemose, president, and other employees of the plaintiff corporation, have received numerous threats to their lives and the lives and safety of their families.

The lower court determined that defendants' picketing had become so enmeshed with violence, harassment, intimidation and property destruction that an atmosphere of fear and terror survives even in the absence of picketing. The court found, furthermore, that defendants in the past

had demonstrated either an inability or unwillingness to comply with court orders which enjoined only violence while permitting peaceful picketing. It concluded that peaceful picketing was so inextricably interwoven with acts of violence as to render impossible the maintenance of domestic peace and order in the community.

Based upon these findings of fact, the lower court concluded that neither the federal Labor-Management Relations Act (LMRA) of 1947, 61 stat. 136, 29 USCA § 151 et seq. nor the Pennsylvania Labor Anti-Injunction Act of June 2, 1937, P.L. 1198, § 1 et seq., 43 P.S. § 206(a) et seq. preempted its equitable jurisdiction to enjoin either violence or *all* congregating within one mile of Altemose construction sites.

Appellants' arguments in support of its appeal from the grant of the preliminary injunction are essentially threefold: (1) where the acts complained of constitute practices either arguably protected or prohibited under sections 7 and 8 of the Labor-Management Relations Act, supra, a state equity court's jurisdiction is preempted in favor of the National Labor Relations Board; (2) conceding the power of the state to enjoin acts of violence in the context of labor disputes, the order below extending even to peaceful picketing violated appellants' First Amendment rights; and (3) even if prohibition of peaceful picketing at work sites is proper under the circumstances, the prohibition of congregating within one mile of such site is unpermissably broad under the First Amendment.[7]

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7. Defendants have filed, in addition to their appeals, a petition for supersedeas of the preliminary injunction pending our disposition on the appeal. A similar petition had previously been filed in the lower court and denied on June 27, 1972. Because the questions presented by the application for supersedeas were closely related to those on the appeal from the injunction decree, we have chosen to hear and decide the appeal as expeditiously as possible, and have not acted on the supersedeas.

Power of state courts to enjoin violence during labor disputes

The hearing court concluded that no labor dispute existed between Altemose and the Council and that the latter's course of conduct was intended to coerce Altemose not to contract with sub-contractors who hire non-union employees. So viewed, the acts complained of constituted an unfair labor practice by the Council within section 8(b)(4) of the Labor-Management Relations Act, supra, 29 USCA § 158(b)(4), commonly referred to as a "secondary boycott." See *Kerr v. Butler Building Trades Council, AFL-CIO, et al.*, 447 Pa. 247, 288 A.2d 525 (1972). Appellants argue that this interpretation of their activities is erroneous in that they were picketing to protest the destruction of area wage standards by Altemose and its subcontractors. If in fact this were so, the Council's activities would be protected under § 7 of the LMRA.[8] Under either view, however, defendants' conduct is "arguably subject to §7 or § 8 of the [Labor-Management Relations] Act" and the Supreme Court has held that in such circumstances the act of Congress vesting jurisdiction in the National Labor Relations Board preempts the jurisdiction of state and federal courts. *San Diego Building Trades Council, etc. v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775 (1959); see *Kerr v. Butler Building Trades Council, supra.* Grafted onto this general rule, however, is an important exception. "The Supreme Court of the United States, both before *and after* the Taft-Hartley

8. While we do not decide the question whether the basic activities complained of were either protected or prohibited conduct under the LMRA, it is at least not clear that the lower court was unjustified in finding a secondary boycott. Defendants admittedly engaged in picketing of Altemose's Prospect Park construction site, a public project governed by the Pennsylvania Prevailing Wage Act, August 15, 1961, P.L. 987, § 1 et seq., 43 P.S. § 165-1 et seq. Altemose's complaint alleged that it was paying union rates on this project and it is our understanding that the prevailing minimum wage rate under the Act is normally union scale.

[Labor-Management Relations] Act, has repeatedly held that *State Courts have the power, the right and the duty to restrain violence, mass picketing and overt threats of violence*, and to preserve and protect public order and safety and to prevent property damage—even if, *absent such conduct*, the activities complained of would constitute unfair labor practices [or protected activities] over which the National Labor Relations Board, would have exclusive jurisdiction: [citations in the margin]"[9] (emphasis in original). *City Line Open Hearth, Inc. v. Hotel, Motel, & Club Employees' Union*, 413 Pa. 420, 431, 197 A.2d 614 (1964). See also *Amalgamated Assoc. of Sheet, Electric Parkway and Motor Coach Employees of America, etc. et al. v. Lockridge*, 403 U.S. 274 (1971).[10] "State jurisdiction

9. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, *Youngdahl v. Rainfair, Inc.* 355 U.S. 131; *United Automobile etc. Workers of America v. Wisconsin Employment Relations Board*, 351 U.S. 286; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740; *Thornhill v. Alabama*, 310 U.S. 88; *Smith v. Pittsburgh Gage & Supply Co.*, 412 Pa. 171, 194 A.2d 181; *Smith's Transfer Corp. V. of Teamsters D.O. Com.*, 409 Pa. 217, 185 A.2d 563; *Terrizzi Bev. Co. v. Local Union No. 830*, 408 Pa. 380, 184 A.2d 243; *Wortex Mills v. Textile Workers U. of A.*, 369 Pa. 359, 85 A.2d 851.

10. Prior to the Supreme Court's clarification of its preemption doctrine in *San Diego Building Trades Council v. Garmon, supra*, state courts apparently were free to intervene in labor disputes at any time the activity complained of violated state public policy, whether it be expressed in a state labor relations act, anti-trust law, or other law of a state. *International Brotherhood of Teamsters v. Vogt*, 354 U.S. 284 (1957); *Building Service Employees International Union v. Gazzan*, 339 U.S. 532 (1950); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 460 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Gibboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Bakery Drivers v. Wohl*, 315 U.S. 769 (1942). See Pendleton, H., "The Unlawful Purpose Doctrine in Peaceful Picketing and its Application in the California Cases," 24 S. Cal. LR 145 (1951). It seems apparent, however, that since *San Diego Building Trades Council*, only the local interest in preserving order will defeat NLRB jurisdiction. *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union*, supra.

has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden [sic] in the absence of clearly expressed congressional direction." *San Diego Building Trades Council v. Garmon*, supra, 359 U.S. at 247.

The same considerations which underly the violence exception to the federal preemption doctrine no doubt promoted the Pennsylvania legislature, in treating of non-federal labor disputes, to divest the jurisdiction of the State Labor Relations Board in favor of the courts where public order is threatened. Section 4(d) of the Labor Anti-Injunction Act, Act of June 2, 1937, P.L. 1198, 43 P.S. 206d(d) provides that the state courts shall be without jurisdiction to issue any injunctions in labor disputes except "where in the course of a labor dispute as herein defined, an employe, or employes acting in concert, or a labor organization, or the members, officers, agents, or representatives of a labor organization, seize, hold, damage, or destroy the plant, equipment, machinery, or other property of the employer with the intention of compelling the employer to accede to any demands, conditions, or terms of employment, or for collective bargaining."

We have no difficulty in concluding that the evidence adduced below and the findings of fact based thereon unquestionably justified the lower court's decree enjoining any future violence by the Council. Appellants do not seriously argue to the contrary.

Picketing Coupled with Violence

Appellants contend that the order below, prohibiting not only acts of violence but peaceful picketing as well, was a violation of their First Amendment rights. They point to numerous decisions of the Supreme Court of the United States sanctioning peaceful picketing or other similar conduct in a variety of contexts. See, *inter alia*, *Shuttleworth*

v. City of Birmingham, 394 U.S. 147 (1969) (parading on city streets without permit required by local ordinance); *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) (peaceful picketing in private shopping center open to public); *Marsh v. Alabama*, 326 U.S. 501 (1945) (rights to distribute religious literature in a company-owned town); *A.F. of L. v. Swing*, 312 U.S. 321 (1941) (peaceful picketing in industrial setting); *Thornhill v. Alabama*, 310 U.S. 88 (1940) and *Carlson v. California*, 310 U.S. 106 (1940) (right to picket peacefully in a public place).

While we of course recognize and are bound by these various holdings, we also know that the Supreme Court has never characterized picketing as pure speech. As recently as 1968, in *Food Employees v. Logan Valley Plaza*, supra, the Court recognized the mixture of elements of which picketing is comprised: ". . . this Court has noted that picketing involves elements of both speech and conduct, . . . and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to control that would not be constitutionally permissible in the case of pure speech. (citations omitted). Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether." 391 U.S. 313-4.

In *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287 (1941), the United States Supreme Court was presented with a situation similar to that now before us. Under the then prevailing "vendor system" of distributing milk in Chicago, milk was sold by dairies to independent vendors who then resold to retailers. These vendors undercut the working standards which had been achieved by the Union in that area. In order to compel observance of their established standards, the Union brought pressure to bear on Meadowmoor Dairies. A suit brought by Meadowmoor eventually resulted in the Illinois

Supreme Court upholding the grant of a permanent injunction prohibiting *all union* picketing, both peaceful and violent. The record contained the following acts of violence: more than fifty instances of window smashing; explosive bombs damaging the plants of Meadowmoor and another dairy using the vendor system; stench bombs dropped in five stores; 3 vendor trucks wrecked, one driven into the river, and one driver seriously injured; one store set afire; two vendor trucks burned; a storekeeper and truck driver severely beaten; workers held at gunpoint and beaten while being told to join the Union.

In upholding the right of the state court to prohibit even peaceful picketing in these circumstances, Mr. Justice Frankfurter, writing for the Court, said: "It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guaranty of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution. . . . [A]cts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct." 312 U.S. at 293-295.

Since 1941, the Supreme Court has not had occasion

to reapply its holding in *Meadowmoor*. The decision, however, has been alluded to in a number of its cases, including several recent ones postdating crystalization of the preemption doctrine; *Caroll v. Commissioners*, 393 U.S. 175 (1968); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957); *Cafeteria Union v. Angeles*, 320 U.S. 293 (1943). The *Meadowmoor* holding was accepted in Pennsylvania before preemption: *Wilkes Sportswear v. ILGWU*, 380 Pa. 164 110 A.2d 418 (1955); *Wortex Mills v. Textile Workers*, 369 Pa. 359 (1952); and it has been followed in other jurisdictions: See e.g., *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *United Aircraft Corp. v. International Association of Machinists*, 161 Conn. 79, 285 A.2d 330 (1971); *cert denied* 92 S.Ct. 675 (1972); *Local #612, International Brotherhood of Teamsters v. Bowman Trans. Co., Inc.*, 165 So 2d 113 (Ala., 1964); *Angle v. Owsley*, 332 SW 2d 457 (Mo., 1959); *Smith v. F & C Engineering Co.*, 285 SW 2d 100 (Ark., 1955); *Local Union #858 v. Jannas*, 200 SW 2d 763 (Ark., 1947). Appellants have cited us to no case, nor has our research discovered any, which in any way impugns the current validity of the *Meadowmoor* doctrine. We hold, accordingly, that *Meadowmoor* retains its vitality in Pennsylvania. The lower court in this case, no doubt with one eye to the *Meadowmoor* decision, was thus fully warranted in enjoining *all* picketing because "defendants' picketing has been enmeshed with violence, threats of violence, harassment, intimidation, vandalism and aggravated situation. . . . [Their] conduct has generated a momentum of fear which continues even in the absence of picketing. If the defendants are permitted to resume picketing in the foreseeable future, it is inevitable that violence will reoccur."

On appeal from the grant or refusal of a preliminary injunction, our scope of review is clear. We look not to the merits of the case, but to discern whether any apparently reasonable grounds exist to justify the action below; if so, the decree will be affirmed unless the record reveals palp-

able legal error. See e.g. *City Line Open Hearth, Inc.*, supra, 413 Pa. at 436. We think that the evidence adduced below amply supports the court's findings. In the first six months of 1972, appellants were responsible for at least four separate incidents of violence causing close to $500,000 in property damage. Half a dozen employees of local contractors were seriously injured by members of the appellant unions and numerous threats emanated from the same sources.

Appellants contend that there was no evidence specifically linking them with many of the alleged acts of misconduct. We think the record is to the contrary. Again a passage from Justice Frankfurter's opinion in *Meadowmoor* is apposite: "These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. And in exercising its power a state is not to be treated as though the technicalities of the laws of agency were written into the Constitution. . . . It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondent superior. [citing cases]." *Meadowmoor*, supra, 312 U.S. at 295.

We agree with the lower court that, as in *Meadowmoor*, defendants' actions involved more than a few isolated incidents of misconduct; rather it demonstrated a pattern of violence coupled with intimidation, harassment, and fear which would inevitably turn even peaceful picketing to violence. While the number of incidents, the total property damage, and the injuries inflicted in this case may fall short of those in *Meadowmoor*, it must be borne in mind that defendants' conduct transpired during the short period

of six months, while the dairy workers in *Meadowmoor* wreaked their havoc over four years. The intensity of the violence here is at least as great, if not greater, than was that in *Meadowmoor*. See also *Local #612, International Brotherhood of Teamsters v. Bowman Trans. Co., Inc.*, supra.

The facts of this case are readily distinguishable from *Wilkes Sportswear v. ILGWU*, 380 Pa. 164, 110 A.2d 418 (1955), where our court modified a lower court injunction to permit peaceful picketing of the plaintiff's premises. The acts of violence complained of in *Wilkes* were characterized as episodic rather than continuous. Little property damage was involved; no serious injuries were reported; the main objection was that pickets blocked the entrances to plaintiff's plant and directed obscene and profane language to its employees. Compare also, *Youngdahl v. Rainfair*, supra.

We hold, therefore, that even defendants' peaceful picketing, indistinguishable and inseparable as it was from acts of violence, is not the type of activity which is protected by the First Amendment; along with and because of the violence which accompanied it, picketing itself was a proper subject for this preliminary injunctive relief.

Appellants contend that the lower court was deprived of jurisdiction by the Labor Anti-Injunction Act, supra. We have already (see page 11, supra) equated section 206d(d) of the Anti-Injunction Act with the violence exception to federal preemption in labor disputes. Extending the analogy only slightly, we have little difficulty concluding that peaceful picketing which is indistinguishable from violence for First Amendment and preemption purposes is by the same token within the purview of conduct enjoinable by the state courts under §206d(d). Cf. *Link Belt Company v. Local Union No. 118 of American Federation of Technical Engineers*, 415 Pa. 122, 202 A.2d 314 (1964); *Fountain Hill Underwear Mills v. Amalgamated Clothing Workers Union*, 393 Pa. 385, 143 A.2d 354 (1958).

Scope of the Injunction

The injunction now appealed from went beyond simply prohibiting any future violent conduct by the appellants and their picketing of Altemose's places of business; it also enjoined the Council and its members "from congregating or assembling in groups within one mile of any of the aforesaid locations." In *Carroll v. Commissioners*, 393 U.S. 175 supra, the Supreme Court said: "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the state may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488, 5 L.Ed. 2d 231, 237, 81 S. Ct. 247 (1960)." 393 U.S. at 183-4.

We agree with appellants that the scope of the present decree is not "couched in the narrowest terms" that will protect "the essential needs of public order." The purpose of the injunction was to insure that there be no repetition of defendants' acts of violence against Altemose. The decree accomplishes that, but at the same time it effectively inhibits union activity, not just that which is directed against Altemose, which is within a one mile radius of any Altemose location. While we realize that any distance which is selected in order to accomplish the goal will necessarily be to some extent arbitrary, we nevertheless feel that one mile is clearly too far. Depending on the placement from time to time of Altemose construction sites, appellants' First Amendment rights to peaceable assembly could be effectively eliminated in southeastern Pennsylvania. The subscribers to this opinion conclude, accordingly, that the decree appealed from should be modified so as to prohibit appellants "from congregating or assembly within 200 yards" of any Altemose place of business.[10]

10½. Justices Roberts, Nix and Manderino would modify the decree so as to permit picketing at the Altemose sites, but by not

Fully mindful of the values of freedom of speech and the right of people peaceably to assemble, as guaranteed by the First Amendment, but acutely aware also of the essential needs of public order, we are satisfied that the decree, with the modification suggested, would meet the test of *Carroll v. Commissioners*, supra.

It goes without saying that any modification of the sweep of the preliminary injunction is in no respect a sanctioning of defendants' past conduct. We anticipate no flouting of the decree as it may be modified, but should it occur we will expect appropriate corrective action to be promptly taken.

Contempt of Court

We turn now to the appeals of the 125 individual appellants, members of the Council, from the judgments of contempt entered against each of them on the afternoon of June 6, 1972 following their arrest for disobedience of the preliminary injunction issued the preceding day.

On June 5, following the issuance of the preliminary injunction, the trial court entered the supplementary order, previously alluded to, directing the Sheriff of Montgomery County to enforce the injunction and to "arrest and bring before the Court on charges of contempt any and all persons interfering with [its] enforcement." On the morning of

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Note 10—*Continued*

more than ten pickets at any one time, and subject to certain other limitations. See the separate opinion of Mr. Justice Roberts. We think that the limited picketing suggested in the separate opinion, while appropriate in many types of mass picketing situations, cf. *Taylor Fibre Co. v. Textile Workers Union*, 395 Pa. 535, 151 A.2d 79 (1959) and *Westinghouse v. United Electrical Workers*, 383 Pa. 297, 118 A.2d 180 (1955), is not realistic or adequate in a situation such as confronted the chancellor in this case; here the conduct sought to be halted was not merely speech or assembly, but "speech [which] is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment". *Carroll v. Commissioners*, supra, 393 U.S. at 180.

June 6, approximately 150 pickets were at the Altemose headquarters. Service of a copy of the injunction decree was refused by appellant Traitz. Using a "bull-horn," the Sheriff then read to the group the terms of the injunction and the order directing him to enforce it. He allowed 15 minutes to disperse or be held in contempt, but this had virtually no effect. The Sheriff then arrested all those persons then in the picket line, a total of 129, and took them to the Montgomery County prison.

The contempt hearing was convened at 2 P.M., apparently on the basis of a contempt petition filed by Altemose and served on the Council.[11] The Commonwealth was represented by the District Attorney, and Altemose and the Buildings Trade Council by their respective attorneys. The individual arrestees were not expressly represented, although counsel for the Council spoke extensively on their behalf. Following the testimony of the Sheriff and other witnesses as to the events of the morning, the trial judge called the contemptors individually to the bar of the court for interrogation by him. The record indicates that 58 individuals stated that they knew of no reason why they should not be held in contempt; others had various excuses. Four were acquitted by the court and found not guilty. One hundred and twenty-five were adjudged guilty of civil contempt. In each case the court imposed a fine of $100, the contemptor to "stand committed until the sentence of the court is complied with." We learn from the lower court's opinion and appellee's brief that later in the day one of the defendant unions, apparently acting on behalf of all the contemptors, paid all of the fines to the Prothonotary of Montgomery County, and thereby secured the release of those individuals being held.

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11. The petition is not part of the record before us. The charges against the union appellants were dismissed for the reason that they were not formally served with the injunction decree until after the contemptuous acts of the individual members had taken place.

Appellants argue that the purpose of these contempt proceedings, and the punishment meted out, establish the offense as indirect criminal contempt, and that they were denied the procedural safeguards incident to that offense. Alternatively, it is argued in similar vein that even if a finding of civil contempt was appropriate, procedural due process was denied. We are asked to reverse the judgments and order that the fines be refunded to the parties.

At the threshold of these appeals we are met by appellees' argument that the appellants have purged themselves of contempt and that the appeals must therefore be dismissed as moot. Reliance is placed upon the decision in *Reap's Appeal*, 88 Pa. Superior Ct. 147 (1926) where one adjudged in contempt of court and fined was held to have no right of appeal after paying the fine and purging himself of the contempt. See also *Com. ex rel. Wilhelm v. Weigley*, 83 Pa. Superior Ct. 189 (1924). The appellant in *Reap's Appeal* contended, as did these appellants at oral argument, that the payment was not voluntary, but made under unlawful duress of his person or property. The Superior Court in *Reap* held that the duress argument could prevail only where there had been "usurpation of power not conferred, not through the irregular exercise of a jurisdiction possessed" 88 Pa. Superior Ct. at 150. See *Cunningham v. Mitchell*, 67 Pa. 78 (1870). There is no doubt that the court below was possessed of both personal and subject-matter jurisdiction, and there was certainly no intentional "usurpation of a power not conferred." We have concluded, however, that the irregularities which characterized the proceeding were sufficiently serious so that the case is analagous to one where there is no power to act. An analogy may be found in *Com. v. Barbono*, 56 Pa. Superior Ct. 637 (1914). There President Judge Rice held that payment of a fine and costs in order to avoid an imprisonment which a justice of the peace had no express authority to order "cannot be regarded as a voluntary act which precludes the defendant from having the lawfulness and

regularity of his conviction reviewed by certiorari." So here, if the fines for contempt were under the circumstances beyond the authority of the court to impose, their payment must be considered as having been made under duress, to avoid imprisonment at least over night, and not with the intention of purging the payors of contempt. Since, as will appear, we find that appellants were not afforded their due process rights, the court was acting without authority in imposing the fines. This is more than a mere "irregular exercise" of jurisdiction; it goes to the core of the validity of the contempt proceeding. We accordingly deny the motion to quash for mootness.

Moving to the merits, the problem is not the sufficiency of the evidence as to the disobedience of the injunctive decree by the appellants, but rather the conduct of the proceedings below. The court was apparently initially of the view that direct criminal contempts had occurred, and proceeded accordingly, in summary fashion. "A direct criminal contempt consists of misconduct of a person in the presence of the court, or so near thereto as to interfere with its immediate business and punishments for such contempts may be inflicted summarily: Act of June 16, 1836, P.L. 784, §23, 24, 17 P.S. §2041, 2042 [case citations omitted]"[12] *Knaus v. Knaus, supra*, 387 Pa. at 375. Apparently concluding in the course of the hearing that the facts did not support a direct criminal contempt,[13] the court's finding in each

12. The Act of 1836 restricts the power of courts to inflict summary punishments for contempts to three categories: (1) the "official misconduct of the officers of such courts"; (2) the "disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court"; (3) the "misbehavior of any person in the presence of the court, thereby obstructing the administration of justice". The Act forbids punishment by imprisonment except as to contempts committed in open court; all other contempts may be punished by fine only. Act of June 16, 1836, P. L. 784, §24, 17 P.S. §2042.

13. Presumably the court came to this conclusion because the picketing was not in close proximity to the courthouse, and therefore not "in the presence of the court", see note 12, supra, and did

instance was that a civil contempt had occurred, and the judgments were so entered. The question is thus whether the offenses were civil contempts, and whether, if so, the contemnors were afforded their proper procedural rights.

As former Chief Justice Bell well said, in speaking for the court in *Brocker v. Brocker*, 429 Pa. 513, 241 A.2d 336 (1968),[14] "the dividing line between civil and criminal contempt is sometimes shadowy or obscure." Indeed, the same misconduct may amount to both civil *and* criminal contempt, 429 Pa. at 519. The controlling factor in drawing this line in a particular case is the "dominant purpose and objective" of the court's order. *Brocker v. Brocker*, supra; *East Caln Township v. Carter*, 440 Pa. 607, 269 A.2d 703 (1970); *Com. v. Harris*, 409 Pa. 163, 185 A.2d 586 (1962); *Philadelphia Marine Trade Association v. International Longshoremen's Association*, 392 Pa. 500, 506-512, 140 A.2d 814 (1958), *Knaus v. Knaus*, 387 Pa. 370, 376, 127 A.2d 669 (1956). In *Knaus* the distinction is stated thus: "If the dominant purpose [of a contempt proceeding] is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt. But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of a private party, proceedings to enforce compliance with the decree of the court are civil in nature. The purpose of a civil contempt proceeding is remedial, and judicial sanctions are employed (1) to coerce the defendant into compliance with the court's order, and (2) in some instances to compensate the complain-

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Note 13—*Continued*

not accept the argument of the appellee that the offenses were constructively in the presence of the court because in the presence of the Sheriff. We think the trial court was correct in its determination.

14. While the court was divided, with one concurring opinion and two dissenting opinions, the disagreements with the majority were not concerned with the definitional discussion of the various types of contempt of court.

ant for losses sustained: *United States v. United Mine Workers of America*, 330 U.S. 258, 303. A judgment in a civil contempt proceeding for the benefit of a private plaintiff will, of course, incidentally vindicate the authority of the court just as on the other hand a criminal contempt judgment, which is punitive, may often advance private interests. But the test is the dominant purpose, not the incidental result: *Gompers v. Bucks Stove & Range Company*, 221 U.S. 418, 441." 387 Pa. at 376, 377.

The task of distinguishing between criminal and civil contempts is particularly difficult in those situations where the allegedly contemptuous conduct is violation of a restraining order or injunction, especially if the order or injunction is at the behest of a private litigent. Such contempt, if criminal in nature, are called "indirect criminal", presumably because they do not usually occur in the presence of the court. Act of June 23, 1931, P.L. 925, §1, 17 P.S. §2047.[15]

The lower court has told us, in its opinion, that its purpose in these contempt proceedings was "to compel compliance with the Injunction issued on June 5, 1972, which was to prohibit the massing of persons and picketing at the site in question", and that the contempts were therefore properly considered civil in nature. The record of the proceedings themselves, however, gives support to the theory that the primary motivation was the endeavor to preserve the authority of the court and to protect the interests of the general public. As the trial judge observed from the bench, "Because of the nature of the picketing which took place yesterday [June 5], this Court is trying to calm down the matter, and in the exercise of police powers this Court has forbidden all further picketing or gathering near the sites in which Altemose is engaged in activi-

15. The punishment for such indirect criminal contempts may be by fine not exceeding $100.00 or fifteen days imprisonment, or both. If committed to jail for non-payment of the fine, the person so committed must be discharged at the expiration of fifteen days.

ties . . ." At a later point (but still prior to the introduction of evidence), in answer to a question by defense counsel, the court stated that he was hearing the case as a criminal contempt proceeding. Thus it can be argued that the overriding purpose was to uphold the dignity and authority of the court in its attempt to quell the public disturbances caused by this labor dispute; that the protection of the public peace and order was paramount, and that compliance with the decree, for the benefit of Altemose, was incidental or at least a subordinate objective.

We need not, however, decide here as between civil and criminal, for in either case the proceedings were fatally defective. The long-standing procedural safeguards attendant upon civil contempt proceedings have been recently reviewed by Mr. Justice O'Brien in *Com. ex rel. Magaziner v. Magaziner*, 434 Pa. 1, 253 A.2d 263 (1969).[16] There we stated that civil contempt was a several step process: "rule to show cause why an attachment should not issue, answer and hearing, rule absolute (arrest), hearing on the contempt citation, adjudication of contempt". 434 Pa. at 6. The court quoted with approval the statement in *Douglass-Whister B. Co. v. Simpson*, 233 Pa. 517, 519, 82 A. 760 (1912), that "arrest and imprisonments of a party in a civil proceeding for contempt in violating an order or decree cannot issue without such previous notice as will afford him an opportunity of being heard." While it appears that the individual appellants had notice, through the Sheriff, of the injunction, we think it clear that "opportunity of being heard" embraces more than opportunity, after being first arrested and jailed and without time to consult with counsel if desired, to show cause why one should not be held in contempt. The commencement of the contempt proceeding by arrest and imprisonment and the summary nature of the proceeding as conducted was consonant only with a *direct* criminal contempt.

16. The case was heard by five justices; the opinion spoke for four of them on the point under consideration.

If, on the other hand, the proceeding is to be viewed as one involving *indirect* criminal contempt, the defendants were entitled to bail, to be notified of the accusations against them and a reasonable time to make a defense, and, if demanded, to a trial by jury. Act of June 23, 1931, P.L. 925, §1, 17 P.S. §2047. Nothing in the reprehensible disobedience of those who heard the Sheriff's reading of the court's injunction operated to deprive them of the plain mandate of our statutory law, which are but declaratory of the constitutional guarantees of due process of law. See *Philadelphia Marine Trade Association*, supra, 392 Pa. 500, at 511, 512. As Judge Porter once said, speaking for the Superior Court in another context, "Promptness in the administration of justice is commendable, but haste which disregards fundamental principles may prove disastrous". See *Commonwealth v. Gobel*, 79 Pa. Superior Ct. 59, 62.

Mr. Chief Justice Jones and Mr. Justice Eagen join in this opinion.

APPENDIX B

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

PATRICK N. BOLSINGER
Prothonotary
GEORGE W. DUNN, JR.
Deputy Prothonotary

Philadelphia, 19107
November 29, 1972.

Bernard N. Katz, Esq.
Meranze, Katz, Spear & Bielitsky
2100 Lewis Tower Building
Philadelphia, Pa. 19102

Re: Altemose Construction Company v.
Building & Construction Trades Council of Phila. and Vicinity, et al., Appellants
No. 31, January Term, 1973

Dear Mr. Katz:

This is to advise that the following Order has been endorsed

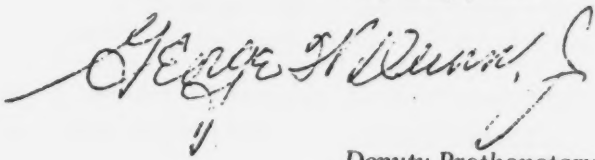
on the Petition for Reargument filed on behalf of the Appellant in the above captioned case:

"Nov. 29, 1972.

Petition for Reargument denied.

s/ Per Curiam."

Very truly yours,



Deputy Prothonotary

GWDJR/s

cc: John C. Butera, Esq.
Butera & Detwiler
516 DeKalb Street
Norristown, Pa. 19401

cc: John W. Pelino, Esq.
Pelino, Wasserstrom, Chucas
& Monteverde
1805 Architects Bldg., 117 S. 17th St.
Philadelphia, Pa. 19103

APPENDIX C

IN THE
COURT OF COMMON PLEAS OF MONTGOMERY
COUNTY, PENNSYLVANIA

No. 72-6295

Equity

ALTEMOSE CONSTRUCTION COMPANY

v.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF PHILADELPHIA AND
VICINITY,

LOCAL 30 UNITED SLATE, TILE AND
COMPOSITION ROOFERS, DAMP AND
WATERPROOF WORKERS ASSOCIATION,

THOMAS MAGRANN

and

STEPHEN J. TRAITZ

Sur: Complaint in equity for
a preliminary injunction

OPINION

CIRILLO, J, August 30, 1972

This is a Complaint in Equity brought by Altemose Construction Company, a Pennsylvania Corporation, Plaintiff, against Building and Construction Trades Council of Philadelphia and Vicinity, Local 30 United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, Thomas Magrann, and Stephen J. Traitz, de-

fendants, seeking an injunction preliminary to final hearing and perpetually thereafter to restrain and enjoin the defendants from preventing or attempting to prevent by picketing, violence, intimidation or coercion in any form, any person or persons from freely entering or leaving the premises of Valley Forge Plaza at which Altemose Construction Company is engaged in the building construction of a hotel and office building, or any other location at which Altemose Construction Company is engaged in any building construction operations or the principal office of Altemose Construction Company, located at 1166 DeKalb Pike, Center Square, Pennsylvania.

The Altemose Construction Company is a general contractor engaged in general construction work. In that capacity it is, and was, under contract to construct a motel and office building at the Valley Forge Plaza, King of Prussia, Montgomery County, Pennsylvania. Altemose has its own employees who are not members of a Union, but primarily Altemose completes its construction work by hiring sub-contractors. Some of the sub-contractors employed by Altemose emply only Union labor, but some do not. Prior to the day in question, the officials of Altemose had received pressure from agents and officials of the two defendant Unions to require Altemose to engage only sub-contractors who use strictly Union Labor.

On June 5, 1972, at approximately 7:30 a.m., nine chartered buses arrived at the Valley Forge Plaza site of Altemose's construction, and disgorged approximately one thousand men. These men proceeded forthwith to assault the project, and they pushed over and destroyed an eight foot cyclone fence which entirely encircled this 27 acre project. The men thereupon, by use of fire bombs, proceeded to destroy all equipment which was found on the site, including trucks, bulldozers, and other construction equipment. They also destroyed the sales office which was on the site, and some of the men attacked the two security guards who were there by throwing rocks at them. The violence

continued for approximately one hour, during which time police arrived but in insufficient numbers to take any affirmative action to halt the burning and violence. Some fire trucks arrived shortly after the violence began but were forced to turn away by the approximately one thousand men who were attacking this project. After the damage was completed, the men began to picket the site, and many of them carried placards indicating that they were members of one, or both, of the defendant Unions. The damage to the property and equipment of Altemose and some of his sub-contractors was estimated at approximately $300,000.

On June 5, 1972, pursuant to Rule of Civil Procedure No. 1531, Section A, a Preliminary Injunction was granted based upon the Complaint, Injunction Affidavits with notice to defendants and testimony, in open Court, under oath from witnesses. After service of the Complaint in Equity and Order of this Court further hearings were held on June 9, 1972, and June 12, 1972, by this Court, at the conclusion of which this Court continued the Preliminary Injunction. The defendants have appealed the issuance of the Preliminary Injunction to the Supreme Court of Pennsylvania. No testimony was offered by the defendants at the hearings. Counsel for the defendants made it clear at the hearings that the purpose of the defendants was not to try to force Altemose to unionize its own employees, but rather to force Altemose to employ only sub-contractors who employed strictly union labor.

Witnesses testified on behalf of the plaintiff, and were subject to cross examination. The defendants did not offer any testimony, but relied on argument to dissolve the Preliminary Injunction.

From the evidence presented, there were made the following:

FINDINGS OF FACT

1. The plaintiff is a Pennsylvania Corporation with principal offices at 1166 DeKalb Pike, Center Square, Penn-

sylvania, and is engaged in the building construction business.

2. Defendant, Building and Construction Trades Council of Philadelphia and Vicinity (hereinafter referred to as "Trades Council") is an unincorporated labor association with its principal office located at 2535 Orthodox Street, Philadelphia, Pennsylvania.

3. Defendant, Local 30 United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association (hereinafter referred to as "Local 30") is an unincorporated labor association with its principal office located at 6447 Torresdale Avenue, Philadelphia, Pennsylvania. Local 30 is a member of defendant, Trades Council.

4. Defendant, Thomas Magrann, is the Business Manager of defendant, Trades Council, employed at Trades Council Offices located at 2535 Orthodox Street, Philadelphia, Pennsylvania.

5. Defendant, Stephen J. Traitz, is an organizer of defendant, Local 30, employed at Local 30's offices located at 6447 Torresdale Avenue, Philadelphia, Pennsylvania.

6. Plaintiff is engaged in construction of a variety of buildings throughout Southeastern Pennsylvania, including construction of a Sheraton Hotel and an office building at Valley Forge Plaza, located at 1st Avenue and Pennsylvania Route 363 in Upper Merion Township, Montgomery County, Pennsylvania.

7. Following a series of attempts during 1971 and 1972 by defendants, Trades Council, Local 30, Thomas Magrann and Stephen J. Traitz, and others to compel Altemose Construction Company to enter into an agreement to use only unionized subcontractors, there began a series of acts of picketing and acts of violence directed at Altemose Construction Company.

8. On August 2, 1971, defendant Traitz warned that unless Altemose entered into agreements to utilize only union subcontractors on roofing projects, the union would have to resort to "something stronger than picketing."

9. On January 24, 1972, picketing was commenced by Trades Council at an Altemose job site at Prospect Park, Delaware County, Pennsylvania.

10. On February 3, 1972, the construction trailer at the Prospect Park School site was burned by an incendiary device, and the work in progress was damaged with losses amounting to approximately Three Thousand Dollars.

11. On March 5, 1972, at approximately 8:30 p.m., five of plaintiff's trucks were drenched with gasoline and set on fire on Germantown Pike near Trooper Road in Norriton Township, Montgomery County, Pennsylvania.

12. During the month of May, 1972, the Trades Council sought to compel plaintiff to enter into an agreement with the Trades Council to utilize only subcontractors unionized by Trades Council or one or more of its local members.

13. Following refusal by plaintiff to enter into such an agreement, counsel for defendant, Trades Council, notified counsel for plaintiff that defendant, Trades Council, would commence picketing at the Valley Forge Plaza site.

14. Pursuant to a plan developed by the Trades Council, defendant, Local 30, declared a "craft holiday" on June 5, 1972, and at approximately 7:30 a.m., on June 5, 1972, about one thousand persons, including defendants Magrann and Traitz, came in assorted vehicles, including seven chartered buses, to the Valley Forge Plaza site at 1st Avenue and Pennsylvania Route 363 in Upper Merion Township.

15. The buses had been chartered and paid for by defendant, Local 30, several days before June 5, 1972.

16. Many of the approximately one thousand persons who arrived at the construction site on June 5, 1972, wore signs identifying them with the Trades Council.

17. As soon as the buses arrived, they stormed the job site and systematically leveled it.

18. The destruction included the leveling of 4,000 feet of an eight-foot high cyclone fence; an office building, guard hut and construction trailer were burned to ashes. Bull-

dozers, graders and pans on the site were destroyed by fire, by the addition of lime to fuel tanks, by battering with hammers and bars on engine components and by the insertion of steel bars through radiators. As each structure or item of equipment was set afire, the mob cheered.

19. Two security guards assigned to the site were stoned and their vehicle was overturned and totally destroyed by fire.

20. Total damage at the site was approximately Three Hundred Thousand Dollars.

21. The local police were present during the raid but were unable to curb the mob and no arrests were made. Although fire trucks were dispatched to the scene promptly and might have limited the destruction caused by the arson, they were turned back by local police because of concern for the safety of firemen. The fire trucks were delayed for almost two hours until a large contingent of State Police was able to reach the scene and part the mob.

22. At approximately 5:00 p.m., on June 5, 1972, this Court issued an injunction prohibiting all picketing by the defendants at any Altemose site or at Altemose's main office and enjoining congregations of members of defendant unions within a mile of the sites and the main office.

23. The next morning, June 6, 1972, approximately one hundred twenty-nine persons, wearing signs associating them with the Trades Council, appeared at the main office of Altemose Construction Company where seventy persons, many of whom are women, are employed.

24. The Sheriff of Montgomery County read the Court's Order and directed the persons to disperse. One Hundred twenty-nine refused to do so and were arrested, and one hundred twenty-five fined $100.00 each for contempt. The fines were paid by the Trades Council.

25. At the very time the Sheriff was taking the contemners into custody, several of them, including defendant Traitz, threatened the life of J. Leon Altemose, President of plaintiff, and his wife.

26. A check of the criminal records of those arrested indicated that approximately forty per cent had prior arrest records, including convictions for rape, aggravated assault and battery with intent to kill, robbery and aggravated assault and battery on an officer.

27. The events of June 5th, 1972, were the culmination of a pattern of violence which the defendants have adopted as a technique for obtaining their goals. Violence and destruction in recent months have become inseparable from the picketing activities of the defendant.

28. On January 25, 1972, Leroy Frye, an employee of Samuel E. Long, Inc., another area contractor, was attacked when he attempted to cross the picket line of a Trades Council member union. He was assaulted by six pickets who, using pick handles, bars and fists, caused broken ribs, multiple severe contusions and lacerations, a concussion and $900 worth of dental work and a large number of stitches.

29. On April 10, 1972, Lloyd Kerr and William B. Freed, both employees of Joseph B. Rogers, Inc., another area contractor, were beaten while they each separately approached different job sites. The beatings occurred on the same day that pickets representing a member of the Trades Council appeared at the job sites. Both men were beaten into unconsciousness without provocation and without any attempt to even cross the picket line.

30. On May 17, 1972, Earl Pedigree and Robert Allen, employees of Kitson Brothers, Inc., an area roofing contractor, were beaten by members of Local 30 after the employees of Kitson Brothers, Inc., had rejected Local 30 in an election conducted by the National Labor Relations Board. The defendant Traitz accompanied the attackers on May 17, 1972.

31. On May 7, 1972, seven of Kitson Brothers, Inc.'s trucks were firebombed.

32. Both before and after the issuance of the injunction in this proceeding, J. Leon Altemose, President of the plaintiff corporation, as well as other employees of the

corporation, have received repeated threats to their lives and the lives and safety of their families.

33. The defendants' picketing has been enmeshed with violence, threats of violence, harassment, intimidation, vandalism and destruction of property, creating an imminently dangerous and aggravated situation.

34. Even where defendants and others acting on their behalf have been restrained by court order to limited number of pickets, they have violated the letter and spirit of the order by threatening workers and their families and recording license numbers of vehicles entering the picketed construction sites.

35. After the assault of Leroy Frye, a court Order limiting the number of pickets was obtained but large numbers of persons gathered nearby and many violated the Order. One person assigned to picket duty fired a gun at tin cans while picketing "in a lawn chair".

36. The defendants' conduct has generated a momentum of fear which continues even in the absence of picketing.

37. If the defendants are permitted to resume picketing in the foreseeable future, it is inevitable that violence will reoccur.

38. After the declaration of war by the defendants against the plaintiff on June 5, 1972, the atmosphere has become irrevocably cloaked with the aura of violence, fear, and terror.

39. Defendants have demonstrated their inability or unwillingness to comply with court orders which only enjoin violence and which permit limited picketing.

40. If the relief requested is not granted, the plaintiff will be irreparably harmed by reason of inability to meet its contractual commitment with regard to construction of facilities and will be unable to proceed because of intimidation of subcontractors and employees. Inability to meet performance dates and to continue construction will result in indeterminate financial loss to customers and permanent loss of business to plaintiff, the value of which is im-

possible to determine. Plaintiff will be without adequate protection of the persons of its officers, supervisors and employees and of its property.

41. None of the pickets or their superiors are or were employed by plaintiff.

42. No labor dispute exists between the Altemose Construction Company and its employees.

43. The purpose of said picketing is to coerce the plaintiff to contract only with Union subcontractors which purpose is illegal under Section 8(b)(4) of the Taft Hartley Act because it amounts to a secondary boycott.

44. Such picketing is not for organization purposes, or collective bargaining.

45. Irreparable loss and damage will result to plaintiff by defendant's conduct.

DISCUSSION

It is readily apparent that the events of June 5, 1972, reveal a well-planned, well coordinated and deliberate attack on the Altemose construction site for the purpose of its complete and utter destruction, which purpose was fully accomplished. The scene was described as one of complete and utter destruction resembling the site of a battlefield in a modern war.

The violence and destruction in this case were so immediate and so total as to constitute conduct which would be intolerable to any Court of law. Therefore, this Court believed that the facts justified its Injunction, and that it was necessary to enjoin any activity at any Altemose site. There was testimony that Altemose had difficulty with one of the defendant Unions previously at another site, and that matter is now before the National Labor Relations Board. Further, on June 6, 1972, approximately 150 pickets appeared at the office of Altemose in Whitpain Township, Montgomery County, Pennsylvania, and, after the Sheriff of Montgomery County, read to them the Injunction and ordered them to disperse, they were all arrested after

failing to disperse, and, after hearing, were found to be in contempt of Court. It is readily apparent from the events recited herein that it was necessary to continue the Injunction in respect to all Altemose's sites.

The Injunction in this case was issued under the general equity powers of this Court, and the police power of the State to enjoin violence, and to insure the security of persons and property which is an inherent right of all citizens under the Constitution.

"The Supreme Court of the United States, both before and after the Taft Hartley Act, has repeatedly held that State Courts have the power, the right and the duty to restrain violence, mass picketing and overt threats of violence, and to preserve and protect public order and safety and to prevent property damage—even if, absent such conduct, the activities complained of would constitute unfair labor practices over which the National Labor Relations Board would have exclusive jurisdiction. (citing cases)." *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees Union*, 413 Pa. 420, 431 (1964). The Court further stated on page 433 of 413 Pa., 420, 433. "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction."

Chief Justice Benjamin R. Jones summed up the State Court's jurisdiction in these matters excellently in *Fountain Hill Mills v. Amalgamated Clothing Workers' Union of America*, 393 Pa. 385, 395 as follows: "It was pointed out in the Garner case (p. 488) that a State may still exercise 'its historic powers over such traditionally local matters as public safety and order. . . .'" In *Milk Wagon Drivers Union of Chicago Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 295, it was categorically declared that "The Fourteenth Amendment still leaves the State ample discretion in dealing with manifestations of force in the settlement of industrial conflicts."

This is not a bona fide labor dispute, and it could not be made such by the fact that after the destruction was

complete, some of the defendants carried placards and picketed peacefully. The Labor Anti-injunction Act of 1937, 43 P.S. 206(a), et sec., specifically provides in Section 4 thereof, 43 P.S. 206(d) that the prohibition against Injunctions shall not apply where the members of a labor organization seize, hold, damage or destroy the equipment, or other property of an employer with the intention of compelling the employer to accede to any demands, terms or conditions of employment or for collective bargaining. It is clear that there was a complete seizure of the Altemose site in this case which could not have been prevented by the relatively small number of police who arrived at the scene, and, therefore, it could not be considered as any form of mass picketing. Where there has been mass picketing, physical force, intimidation, and threats of force, it is proper to issue an injunction: *Link Belt Co. v. Local Union No. 118*, 415 Pa. 122.

This defendant (Building & Construction Trades Council of Philadelphia and Vicinity) made the same argument before the Supreme Court of Pennsylvania through their attorney Bernard Katz, Esquire, in the case of *Philadelphia Minit-Man Car Wash Corporation v. Building and Construction Trades Council of Philadelphia and Vicinity, Appellant*, 411 Pa. 585, 588 (1963), and Mr. Justice Roberts held that where they were "intimidating workers by threats and damage to property" the above cited Act does not apply because of Section 4(d) of the Act which "provides that the Act shall not apply where the Union seizes, holds, damages or destroys property of the employer". Cited with approval of Mr. Justice Roberts, in *Link Belt Co. v. Local 118 of American Federation of Technical Engineers*, 415 Pa. 122, 127, 129 (1964).

There have been many instances where injunctions have been upheld which involved far less violence than the present case, and far fewer numbers of alleged pickets.

Counsel for the defendants conceded at the time of the hearing on the Preliminary Injunction that it was not his intention to try to organize the employees of the Altemose

Corporation. It is obvious from all of the testimony which went uncontradicted that the purpose of the mass picketing of the Altemose Construction site was what is tantamount to a secondary boycott in violation of Section 8 (b) 4 of the Taft Hartley Act. The United States Supreme Court in the case of National Labor Relations Board v. Operating Engineers 400 U.S. 297 (1971) specifically stated that if the purpose of picketing is to try to coerce a corporation into not doing business with subcontractors who are non-union, then the picketing was illegal because it was a secondary boycott. Chief Justice Benjamin R. Jones in *Fountain Hill Mills v. Amalgamated Clothing Workers Union of America*, supra, states: "Furthermore, not only must picketing be conducted in a peaceful manner, but the object which it seeks to attain must be legitimate and lawful: (citing cases)" 393 Pa. 385, 392 (1958).

The Court finds that the purpose of the picketing was illegal, and, therefore, in addition to the violence, threats of violence, and destruction of property, issued the above mentioned Preliminary Injunction.

It has been said many times in the law that picketing is an extension of the freedom of speech guarantee of the United States Constitution. However, even such a fundamental right must be limited or forfeited when the use of the fundamental right becomes a flagrant violation of other fundamental rights guaranteed equal protection under the law. The right of every one to be secure in his person and property is such a fundamental right. When two such rights run headlong into each other, the more dominant right must necessarily prevail. In this case the right to the security of life and property must prevail. When an individual is convicted of a serious crime and is sentenced to prison, his fundamental right to liberty is taken away from him. Our Appellate Courts have restricted the fundamental right of individuals who are disruptive in Courts during their own trials, by permitting said individuals to be bound and gagged, and, in certain rare cases, even removed from the Court room, thereby limiting their right to freedom of

speech, and the confrontation of their accusers. The Supreme Court of the United States in a case handed down during the week of July 3rd, 1972, limited the freedom of expression, or freedom of speech right, in order to protect private property. The case involved the giving out of leaflets in a shopping center, and the Supreme Court held that the owners of property could prohibit their distribution in order to protect said private property. This Court fully realizes the severity of a one mile limitation to picketing. However, with a history of automobiles, which had been on job sites during the daytime, having their tires slashed at night after their owners had returned from the job sites and parked them in front of their houses; trucks being followed into other jurisdictions and coincidentally being burned to the ground after having made deliveries to the job sites; trucks also having their tires punctured with ice picks after delivering material on the job site, unless the Court would look the other way, it becomes necessary, in the exercise of the police power, for this Court to issue the Preliminary Injunction which it did in this case.

In light of the Findings of Fact and Discussion, there are made the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this suit.

2. The defendants did seize, hold, damage and destroy the property of the plaintiff within the meaning of the exceptions stated in Section 206d(d) of the Pennsylvania Labor Anti-Injunction Act, 1937, June 2, P. L. 1198, Section 4; 1939, June 9, P. L. 302, Section 1.

3. The Pennsylvania Labor Anti-Injunction Act does not apply to this dispute.

4. There is no labor dispute between plaintiff and defendants.

5. The course of conduct of the defendants was intended to coerce plaintiffs not to contract with sub-contractors who hire non-union employees.

6. Peaceful picketing by defendants is coercive when its object and intent is to compel plaintiff not to contract with subcontractors who hire non-union help.

7. Defendants' conduct has caused plaintiffs substantial loss and irreparable damage.

8. The picketing of plaintiffs' job site and office building is unlawful.

9. The defendants' conduct poses an imminent and continuing threat to the maintenance of domestic peace and public order in this community and in this Commonwealth.

10. The jurisdiction of this Court is not preempted by the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. Section 151.

11. A restriction on picketing within one mile of the plaintiffs' property is a lawful remedy where, as here, it is necessitated by a pattern of picketing so enmeshed with violence as to demonstrate that the defendants will not picket peaceably.

12. The plaintiff is without an adequate remedy at law.

13. The plaintiff stands before the Court as the innocent victim of planned violence and destruction by the defendants of a magnitude which has shaken this community and shocked the conscience of this Court.

14. A preliminary injunction in conformity with the relief requested in plaintiff 's Complaint is the appropriate and essential relief.

ORDER

And Now this 30th day of August, 1972, plaintiff having presented his Complaint in Equity seeking a Preliminary Injunction against defendants, and a Preliminary Injunction having been issued upon Injunction Affidavits,

testimony, and with notice to the defendants, because of immediate and irreparable damage, after a full hearing, it appears to the Court that the defendants and others acting on their behalf engaged in a virtual military assault upon Valley Forge Plaza, at which plaintiff is engaged in the building construction operation causing great physical damage, including the burning of buildings and vehicles, and over-turning of vehicles, no less than 400 and possibly as many as 1000 persons acting in concert destroyed 4000 feet of an eight foot high cyclone fence, entered the premises throwing rocks and other missiles and incendiary devices, threatening the lives of security guards, blocking roadways as so to prevent any action by police or fire trucks, and failing to respond to any and all pleas by police and firemen to cease such activity. And, it further appearing that the police force of approximately fifty was unable to cope with the planned assault of massive groups exceeding seven hundred, and it further appearing to the Court that immediate and irreparable damage and injury will result to the plaintiff before the case can be fully heard on its merits if a special injunction is not issued, it is on the motion of counsel for the plaintiff, one, that an injunction be issued preliminarily until a hearing is held enjoining and restraining the defendants, their members, and all other persons acting on behalf of them or any of them from preventing or attempting to prevent by picketing, violence, intimidation or coercion in any form any person or persons from freely entering or leaving the premises of Valley Forge Plaza, at which Altemose Construction Company is engaged in the building and construction of a hotel and office building, or any other location at which Altemose Construction Company is engaged in any building construction operation, or the principal office of Altemose Construction Company located at 1166 DeKalb Pike, Center Square, Pennsylvania. Also, from having any pickets in front of or close proximity to any entrance to Valley Forge Plaza or at any other location at which Altemose Construction Company is engaged in construction work, and

the premises of Altemose Construction Company. Also, from congregating, loitering or dallying in front of, near to or about said premises, or the entrances thereto at any time. Also, from congregating or assembling in groups within one mile of any of the aforesaid locations; also, from interfering with any deliveries to or by Altemose Construction Company at any of the aforesaid locations; also, from blocking ingress and egress to and from the premises of Valley Forge Plaza, Altemose Construction Company, or any location at which Altemose Construction Company is engaged in building construction. Also, from taking any action or pursuing any course of conduct which is intended to or has the necessary effect of threatening, intimidating or coercing officers, supervisors and employees of Altemose Construction Company or persons doing business with Altemose Construction Company; also, from threatening, intimidating or harassing employees of Altemose Construction Company or persons doing business with Altemose Construction Company; also, from seizing or damaging any property of Altemose Construction Company, it officers, supervisors or employees, or persons doing business with Altemose Construction Company, including subcontractors.

BY THE COURT:

APPENDIX D

IN THE

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

Civil Action—Equity

No. 72-6295

ALTEMOSE CONSTRUCTION COMPANY

v.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY,

LOCAL 30 UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION,

THOMAS MAGRANN

and

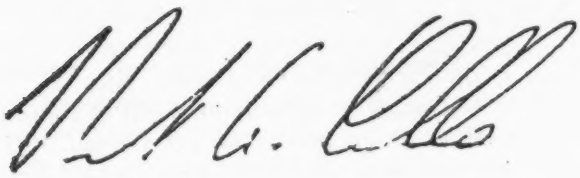
STEPHEN J. TRAITZ

Sur: Complaint in equity for a preliminary injunction

ORDER

AND NOW this 25th day of October, 1972, the Order of this Court dated June 5, 1972, is hereby amended to read as follows: (d) From congregating or assembling in groups within two hundred (200) yards of any of the aforesaid locations. In all other respects the Order of this Court of June 5, 1972, is hereby confirmed and continued and will remain in full force and effect.

BY THE COURT:



APPENDIX E

Statutory and Constitutional Provisions Involved

United States Constitution:

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of each State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in

the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Labor Management Relations Act of 1947, *as amended:*

29 U.S.C.A. §157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to

refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120 Title I, §101, 61 Stat. 140.

29 U.S.C.A. §158:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided

in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or ter-

minated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or

transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the discrimination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms

and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)—(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided*

further, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for

priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title. July 5, 1935, c. 372, §8, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140; Oct. 22, 1951, c. 534, §1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, §201(e), Title VII, §§704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1158.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY

and

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION

and

THOMAS J. MAGRANN

and

STEPHEN J. TRAITZ,

Petitioners,

v.

ALTEMOSE CONSTRUCTION CO.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, Eastern District.

RESPONDENT'S BRIEF IN OPPOSITION.

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QUESTION PRESENTED.

For the reasons set forth in the argument below, Petitioners' questions 1 and 3 are not raised by the facts of this case. The issue involved in Petitioners' question 2 may be more accurately stated in the context of this case as follows:

> —Where picketing is enmeshed in a pattern of violence and destruction so as to pose a threat to public order and domestic peace, does the Labor Management Relations Act of 1947, as amended, 29 U. S. C. A. Section 158, et seq. preempt the jurisdiction of a state court to ban the picketing?

STATEMENT OF THE CASE.

Petitioners' statement of the case is inadequate. The case is truly stated by the findings of fact of the trial court (Petitioners' Appendix C at 34a-40a), and the narrative summary of the facts set forth in the controlling Opinion of the Supreme Court of Pennsylvania (Petitioners' Appendix A at 6a-12a).

In short, an order was issued proscribing Petitioners from picketing Respondent's premises and job sites or congregating within 200 yards thereof. The order responded to a systematic campaign of terror by which Petitioners sought to gain absolute control of all work opportunities in commercial construction in Southeastern Pennsylvania. The campaign was characterized by savage beatings of workmen, arson, bombings, and threats of death, directed at Respondent and others. Petitioners have historically used, with apparent immunity from criminal prosecution, a para-military pattern of initial violent assault. When a court order merely limiting the number of pickets has been obtained, Petitioners have initiated a second stage. In this stage, pickets have acted as spotters, directing roving gangs in further destruction and violence. Invariably, these violations of court orders have resulted in no legal consequence, and the Petitioners' campaign has been successful.

What the Pennsylvania courts in this case decided, upon clear proof that Respondent had been the victim of the first stage of Petitioners' campaign, was to enter an order which would preclude Petitioners from carrying out the second stage.

ARGUMENT.

1. No Constitutional Issue Is Presented.

Petitioners seek a writ of certiorari on the assertion that this case relates to the permissible limitations which may be imposed upon *peaceful* picketing (Petitioners' Questions 1 and 3). No such issue is raised by the facts of this case. The trial court found that violence is the norm for Petitioners and that they never intended to peacefully picket the Respondent. Specifically, the trial court found, *inter alia:*

> —The events of June 5th, 1972, were the culmination of a pattern of violence which the [Petitioners] have adopted as a technique for obtaining their goals. Violence and destruction in recent months have become inseparable from the picketing activities of the [Petitioners]. (Findings of Fact No. 27, Petitioners' Appendix C at 38a)
>
> —[Petitioners] have demonstrated their inability or unwillingness to comply with court orders which only enjoin violence and which permit limited picketing. (Finding of Fact No. 39, Petitioners' Appendix C at 39a)
>
> --If the [Petitioners] are permitted to resume picketing in the forseeable future, it is inevitable that violence will reoccur. (Finding of Fact No. 37, Petitioners' Appendix C at 39a)

These findings were made on the basis of competent, substantial, and totally uncontradicted evidence. Two days of hearings were held, at which the Respondent produced 36 witnesses and numerous exhibits. No witnesses appeared for Petitioners, and there was no denial of the

facts by any of Petitioners. In fact, representatives of the Petitioners who were subpoenaed by the Respondent refused to answer all questions, claiming their rights under the Fifth (not the First) Amendment to the Constitution (Petitioners' Appendix A at 10a).

Accordingly, Petitioners' Questions 1 and 3 are purely hypothetical in the context of this case. Unquestionably, the decisions of the trial court and the controlling opinion of the Supreme Court of Pennsylvania are grounded on this Court's decision in *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1941). There, as here, an extreme pattern of violence, including bombings, beatings and destruction enmeshed with picketing resulted in a total ban on picketing by an Illinois state court on the ground that peaceful picketing was impossible. *Meadowmoor Dairies v. Milk Wagon Drivers Union*, 371 Ill. 377, 21 N. E. 2d 308 (1939).

Petitioners here seek explicit reversal of *Meadowmoor* on the ground that the decisions of this Court in *Youngdahl v. Rainfair*, 355 U. S. 131 (1957), and *Carroll v. Commissioners*, 393 U. S. 175 (1968), have so limited *Meadowmoor* as to make its rationale inapplicable in any case. The contention is a peculiar one indeed, since *Meadowmoor* is expressly cited with approval in both decisions, clearly preserving its vitality for those infrequent situations where a pattern of violence is created as by Petitioners here.

By any view, the cases relied on by Petitioners are inapposite in this instance.

In *Youngdahl*, 37 employees, nearly all of whom were female, went on strike and picketed their employer to obtain recognition of a union. Their primary offenses were verbal, including name calling, and the chanting of such songs as "When The Scabs Go Marching In" (to the tune of "When The Saints Go Marching In"). Their physical activity con-

sisted of thrusting out their tongues and holding their noses as insulting gestures to employees who crossed the picket line.

A permanent injunction banning all picketing in that case was set aside by this Court, on the stated ground that there had been no pattern of violence of *Meadowmoor* proportions.

Compare 37 singing, face-making employees, picketing their own place of work, to Petitioner's year long orgy of violence and destruction, culminating in the premeditated unleashing of a mob of 1,000 men (none of whom were employed by the Respondent or its subcontractors) with the specific assignment of leveling an entire construction site (Findings of Fact, Petitioners' Appendix C at 34a-40a).

Carroll v. Commissioners, supra, involved a white supremacist group known as the National States Rights Party ("NSRP"). The group held a public rally in Somerset County, Maryland on a summer evening. During the rally, a series of extreme racist speeches were broadcast over a public address system to a crowd of 150 persons, including about 40 blacks. There was also an announcement of a second rally the following night. No violence occurred.

The following day, county officials obtained a 10 day restraining order, barring NSRP rallies or meetings in the county. That order was granted *ex parte,* without notice to, or attempt to notify, the defendants, formally or informally.

The narrow holding of this Court was that an injunction touching in the sensitive area of the First Amendment should not issue *ex parte,* unless reasonable efforts have been made to give the defendants an opportunity to participate. That issue is not raised here. Every effort was made to give the Petitioners notice of Respondent's intention to seek injunctive relief. As stated by the Supreme Court of Pennsylvania:

> "Altemose's counsel indicated at the June 5 hearing that his efforts to serve notice on defendants of plaintiff's intentions to present its petition for a preliminary injunction had proved unavailing. Telephone messages left at the office of the Council's attorney received no response, and Local 30 was sent a telegram between 1:00 P. M. and 1:30 P. M. because it had no phone listing. The hearing commenced at approximately 4:00 P. M." (Footnote 4, Petitioners' Appendix A, at 8a)

The initial preliminary injunction issued on the basis of affidavit and testimony. The order presently under challenge issued only after a full hearing held within five days of the issuance of the initial order, with all parties represented by counsel. Evident from the record of that hearing is that, unlike *Carroll,* this case involved no prior restraint. Extreme systematic violence had occurred by the time the challenged order issued. Petitioners had blazed a year long trail of blood and fire before the Respondent sought and obtained the injunction. There was nothing *prior* or theoretical about the need for relief.

Although it forms no part of the holding, this Court commented in *Carroll* that orders touching upon First Amendment rights should be no broader than necessary to meet the essential needs of public order. In the light of that comment, but with awareness of the trial court finding that Petitioners had violated orders which only limited rather than banning picketing, the Pennsylvania Supreme Court concluded that the one mile buffer zone was unnecessarily large, and reduced the protective barrier to 200 yards (Petitioners' Appendix A at 21a).*

* Petitioners' brief does not disclose that Petitioners have recently filed in the Court of Common Pleas of Montgomery County a motion to further modify or dissolve the preliminary injunction. This motion will come on for hearing in due course.

2. Preemption Does Not Apply.

The preemption issue raised by Petitioners' Question 2 and Respondent's restatement of it is one about which this Court has been absolutely and uniformly clear. The preemption doctrine does not affect strongly held local interests. Thus, in *Amalgamated Motor Coach Employees v. Lockridge,* 403 U. S. 274 (1971), this Court noted with reference to *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959):

> "Garmon itself recognized that Russell permitted state courts 'to grant compensation for the consequences as defined by the traditional law of torts, of conduct marked by violence and imminent threats to public order'." (403 U. S. 274, footnote 7)

The findings and conclusions of the Chancellor on this subject clearly place the subject matter outside the preempted zone:

> —The local police were present during the raid but were unable to curb the mob and no arrests were made. Although fire trucks were dispatched to the scene promptly and might have limited the destruction caused by the arson, they were turned back by local police because of concern for the safety of firemen. The fire trucks were delayed for almost two hours until a large contingent of state police was able to reach the scene and part the mob. (Finding of Fact No. 21, Petitioners' Appendix C at 37a)
>
> —The defendant's conduct poses an imminent and continuing threat to the maintenance of domestic peace and public order in this community and in this Commonwealth. (Conclusion of Law No. 9, Petitioners' Appendix C at 45a)

3. The Order Is Clear.

Finally, Petitioners would have this Court believe that confusion and uncertainty exists as to the proper application of the present injunction. It is not unusual for those who dislike what they know to be the clear meaning of an injunction to resort to absurd construction. The union asserted a similar confusion in the *Meadowmoor* case. This Court disposed of that contention as follows:

> "Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one was fired with a zeal to pervert. If an appropriate injunction were put to abnormal uses in its enforcement so that encroachments were made on free discussion outside the limits of violence, as for instance, discussions through newspapers or on the radio, the doors of this Court are always open." (312 U. S. at 298)

Fortunately, the circumstances which warrant the application of *Meadowmoor* are rare. Unfortunately, they occur regularly whenever Petitioners are involved. The holding of *Meadowmoor* is clearly alive and well. In *Carroll* this Court, citing *Meadowmoor* with approval, said:

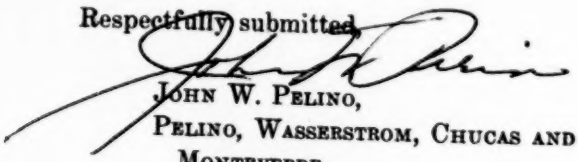
> "We do not here challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment." (393 U. S. at 180)

Petitioners seek to bring before this Court a well settled issue, in the hope that they may obtain some pronouncement that sustained violence under the guise of picketing may never be dealt with by the Courts.

CONCLUSION.

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,



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